

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of JTP, Minor.

TAMMY DUELL,

Petitioner-Appellee,

v

CHRISTOPHER PERRIEN,

Respondent-Appellant.

UNPUBLISHED

August 12, 2004

No. 254627

Ionia Circuit Court

Family Division

LC No. 03-000026-AY

Before: Hoekstra, P.J., and Cooper and Kelly, JJ.

MEMORANDUM.

Respondent appeals as of right from an order terminating his parental rights to his daughter pursuant to a petition filed by the child's mother under MCL 710.51(6), a provision of the Adoption Code. The court found that respondent had not substantially complied with a support order or had contact with his daughter for two or more years before the filing of the petition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

It was undisputed that a support order had been in effect since 1994, that respondent had only made thirty-one documented payments between 1994 and the filing of the petition on July 17, 2003; that respondent had arrearages totaling \$12,228.59; that respondent's last documented payment was in October 2000; and that respondent had been in jail or prison since October 2001. Although not documented, petitioner stipulated that respondent made three or four payments between May 2001 and October 2001. MCL 710.51(6)(a) is satisfied if the petitioner shows that "a support order has been entered, [and the respondent] has failed to substantially comply with the order, for a period of 2 years or more before the filing of the petition." The three to four payments in 2001, if made, would not constitute substantial compliance with the order for the two years preceding the filing of the petition and the sporadic payments before that time belie substantial compliance with the order.

Respondent asserts that a showing of ability should be required, and that he was unable to pay due to his incarceration. He maintains that *In re Colon*, 144 Mich App 805; 377 NW2d 321 (1985), was wrongly decided to the extent it interpreted subsection (6)(a) to mean that if a support order has been entered, ability to pay need not be established since ability has already been determined in conjunction with the support order. However, this Court reached the same

conclusion in *In re Caldwell*, 228 Mich App 116, 122; 576 NW2d 724 (1998), and *In re Newton*, 238 Mich App 486, 491; 606 NW2d 34 (1999). These decisions create binding precedent unless reversed or modified by the Supreme Court or a special panel of this Court. MCR 7.215(J); *Straman v Lewis*, 220 Mich App 448, 451; 559 NW2d 405 (1996).

Respondent, relying on *Caldwell*, also asserts that the court erred in looking beyond the two years immediately before the filing of the petition in determining that there was a failure to substantially comply with the support order. However, the Court in *Caldwell* held that the “statutory period begins on the filing date and extends backward from that date for a period of two years or more.” *Caldwell, supra* at 119. It requires that the court look at the two years immediately before the filing, as opposed to looking at the two years immediately preceding incarceration, but in no way precludes the court from also looking at additional years in determining whether there was substantial compliance.

Respondent does not dispute that he had no contact with his daughter for more than two years before the filing of the petition. However, he argues that the court erred in finding that he had the ability to contact his daughter, a finding required by MCL 710.51(6)(b). Defendant asserts that Tammy Duell’s personal protection order against him had the effect of precluding him from contacting his daughter. He also maintains that he did not have an address or telephone number for his daughter. However, the record supported the trial court’s conclusion that respondent had the ability to take steps to initiate reinstatement of visitation privileges, which had been suspended in 1999, but failed to do so. Thus, we find no reason to disturb the trial court’s finding that respondent had the ability to contact but did not for two or more years before the filing of the petition.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly